RECORD AND BRIEFS

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No. 17-368

In the Supreme Court of the United States

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT,
Petitioner,

v.

SOLARCITY CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether an order denying a motion to dismiss under the antitrust state-action doctrine can satisfy this Court's stringent standard for interlocutory review under the collateral-order doctrine and, if so, whether the collateral-order doctrine is satisfied where the defendant is a business enterprise that lacks sovereign powers, or where the district court anticipated that the defense would be raised again after the pleadings stage.

RULE 29.6 STATEMENT

Respondent SolarCity Corporation is wholly owned by Tesla Motors, Inc., a publicly traded company.

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INTRODUCTION

Respondent SolarCity Corporation ("SolarCity") brought this case against Petitioner Salt River Agricultural Improvement and Power District ("SRP") under both federal and state antitrust law. SolarCity offers solar panels and services that allow consumers to shift electricity purchases away from utility companies. SRP is an incumbent electric utility in the Phoenix metropolitan area. This suit challenges SRP's anticompetitive conduct that excludes competition from SolarCity and other distributed power firms.

This Court has previously explained that SRP is "essentially" a "business" enterprise that has limited governmental authority, lacks any general sovereign powers, and that does not exercise any traditional sovereign prerogative in its unregulated retail electric business. *Ball v. James*, 451 U.S. 355, 367-70 & n.11 (1981).

At the pleading stage, the district court declined to dismiss SolarCity's challenge to SRP's conduct under the federal state-action doctrine. SRP then noticed an appeal of the denial of its motion to dismiss based on the collateral-order doctrine. The Ninth Circuit dismissed the appeal, holding that the antitrust state-action doctrine is at most an "immunity" from liability, not an immunity from suit or the judicial process, and therefore an issue that can be effectively reviewed after final judgment. The Ninth Circuit thereby joined every other Circuit in the past twenty years that has been asked to expand

the collateral-order doctrine to accommodate a state-action doctrine appeal (the Fourth, Fifth, and Tenth), as well as the Sixth Circuit, which has refused interlocutory state-action appeals for over forty years.

There is no Circuit split on the dispositive question in this action: whether collateral-order review is available for a denial of an antitrust state-action doctrine motion to dismiss brought by an entity that is essentially a private business. No Circuit has approved collateral-order jurisdiction in such circumstances. Rather, all five Circuits to have addressed the issue in this context will dismiss such appeals (the Fourth, Fifth, Sixth, Ninth, and Tenth).

Petitioner seeks certiorari on a broader question, and one that need not be answered to resolve this dispute: whether *any* order denying an antitrust state-action defense may be immediately appealable, regardless of the nature of the petitioner. On that question, there is nominally a 3-2 Circuit split, with the Fifth and Eleventh Circuits in the minority, having taken the position advocated by SRP in opinions issued over twenty years ago. Since then three other Circuits have held to the contrary and one of the two minority Circuits has taken significant steps toward joining the majority. That modern authority is coalescing against permitting interlocutory appeals from denials of antitrust state-action motions to dismiss reflects this Court's increasingly firm admonitions that the collateral-order doctrine is narrow and applies only when stringent requirements are met.

The growing obsolescence of the broader split is also consistent with this Court's recent state-action doctrine jurisprudence. Twice in recent years the Court has reiterated that the state-action doctrine is a narrow and "disfavored" tool of statutory interpretation—far from the strong immunity from suit or the judicial process itself that the collateral-order doctrine requires.

The petition should be denied because:

1. The collateral-order doctrine issue, which involves an essentially private business enterprise, does not implicate any Circuit split, and the Circuit split that does exist is in the process of resolving itself.

2. This case is an inappropriate vehicle for this Court's review because the district court's order fails to meet the requirements for collateral-order review independent of the question presented by SRP. The collateral-order doctrine requires an order that "conclusively determines" the issue at hand, but here the district court expressly reserved any conclusive determination for a later stage.

3. This case is also a poor vehicle for addressing collateral-order jurisdiction because SRP will face suit regardless of the resolution of its interlocutory appeal concerning the antitrust state-action doctrine. Respondent's independent state law antitrust claims are not subject to SRP's claimed antitrust state-action defense.

4. The decision below is correct. The Ninth Circuit panel (of Judges Kozinski and Friedland, joined by Judge Gilman of the Sixth Circuit, sitting by designation) comprehensively addressed the issues in a soundly reasoned opinion that is fully consistent with this Court's precedent and the Fourth and Sixth Circuits' well-reasoned opinions.

STATEMENT OF THE CASE

I. The Doctrines At Issue

Collateral-Order Doctrine. The collateral-order doctrine is a narrow exception to the prohibition on interlocutory appeals. This Court's decisions over the years have explained, with increasing emphasis, that attempts to extend the doctrine are disfavored and viewed "with a jaundiced eye." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106-07 (2009); *Will v. Hallock*, 546 U.S. 345, 349-50 (2006); *Swint v. Chambers Cty. Comm'n*, 514 U.S. 35, 43 (1995) ("jaundiced eye") (quoting *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 873 (1994)).

To satisfy the collateral-order doctrine, a decision must (1) "conclusively determine the disputed question," (2) "resolve an important issue completely separate from the merits of the action," and (3) "be effectively unreviewable on appeal from a final judgment." *Will*, 546 U.S. at 349 (citations and internal quotation marks omitted). Immunities from suit—such as sovereign immunity under the Eleventh Amendment and qualified immunity—generally meet these requirements. *Id* at 350. In contrast, defenses and doctrines that provide only

immunity from liability (for example, based on statutory construction) do not. *Id.*

Antitrust State-Action Doctrine. All persons, including state actors, are presumptively subject to antitrust laws because those laws embody our "fundamental national values of free enterprise and economic competition." *FTC v. Phoebe Putney Health System, Inc.*, 568 U.S. 216, 225 (2013). However, this Court in *Parker v. Brown*, 317 U.S. 341 (1943), recognized what the Court has since made clear is a narrow and "disfavored" exception for state actors under some circumstances. *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101, 1110 (2015) (citation and internal quotation marks omitted. *Parker* inferred that "because 'nothing in the language of the Sherman Act [15 U.S.C. § 1 *et seq.*] or in its history' suggested that Congress intended to restrict the sovereign capacity of the States to regulate their economies, the Act should not be read to bar States from imposing market restraints 'as an act of government.'" *Phoebe Putney*, 568 U.S. at 224 (quoting *Parker*, 317 U.S. at 350, 352). As antitrust law has matured, *Parker*'s inference from Congressional silence has grown into a formalized antitrust defense known as the antitrust state-action doctrine.

A proponent of the antitrust state-action doctrine must establish that it acted pursuant to a "clearly articulated" policy and that the State "affirmatively contemplated the displacement of competition such that the challenged anticompetitive effects can be attributed to the 'state itself.'" *Id.* at 219, 229

(quoting *Parker*, 317 U.S. at 352). Putative state actors that lack general governmental powers and have structural features that create incentives to favor private interests must also demonstrate that they are "actively supervised" by an arm of the State. *N.C. State Bd.*, 135 S. Ct. at 1110, 1114 (citations and internal quotation marks omitted). These requirements prevent entrenched "parochial" interests from excluding competition any further than a State sovereign actually approves and supervises. *Id.* at 1112.

II. The Parties

Respondent SolarCity offers products and services that use solar panels and related systems to allow consumers to substitute purchases of retail electricity from utilities with electricity generated at the customer's site. Am. Compl. ¶¶ 3, 50, 70-71 (ER47, ER56, ER59-ER60).

Petitioner SRP is an electric utility in the Phoenix, Arizona metropolitan area. SRP was created in 1903 to take advantage of a federal law that provided interest-free loans for landowners to build reclamation projects to irrigate their lands. *Ball*, 451 U.S. at 357-58. Reclamation projects were allowed to sell hydroelectric power to fund those projects. *Id.* at 358. During the Great Depression, SRP successfully lobbied the Arizona legislature for a statute denominating SRP a political subdivision so the landowners who ran SRP could avoid income taxes and sell tax-free bonds. *Id.* Arizona denominates SRP a public entity, but as this Court

has explained, SRP and organizations like it are "essentially business enterprises, created by and chiefly benefitting a specific group of landowners." *Id.* at 368 (citations omitted). Among other things, SRP lacks "the crucial powers of sovereignty typical of a general purpose unit of government" and SRP's electric business does not implicate any traditional sovereign power. *Id.* at 367-70.

Specifically, SRP "is a governmental entity only in the limited sense" of its water and reclamation functions, and "does not exercise the crucial powers of sovereignty typical of a general purpose unit of government." *Id.* at 372 (Powell, J., concurring). SRP became a major electricity utility by historical accident, and its electric operations are therefore considered "proprietary" activities for nearly all purposes. *City of Mesa v. Salt River Proj. Agric. Improvement & Power Dist.*, 92 Ariz. 91, 100 (1962). Indeed,

> the sole legislative reason for making water projects [such as SRP] public entities was to enable them to raise revenue through interest-free bonds, and [] the development and sale of electric power was undertaken not for the primary purpose of providing electricity to the public . . . .

Ball, 451 U.S. at 369.

"Most municipal corporations are owned by the public and managed by public officials." *Local 266, I.B.E.W. v. Salt River Agric. Improvement & Power*

Dist., 78 Ariz. 30, 44 (1954). In contrast, SRP is owned and run by private landholders, and "[t]he profits from the sale of electricity are used to defray the expense in irrigating these private lands for personal profit . . . . [T]he District operates for the benefit of these 'inhabitants of the district' who are private owners." *Id.* Only landholders in SRP's original geographic area can vote in SRP elections, leaving non-landowner natural persons, corporations, and charitable, educational and religious institutions, as well as all landowners outside SRP's original geographic area, unrepresented. Am. Compl. ¶ 32 (ER52); *Ball*, 451 U.S. at 358; *Gorenc v. Salt River Proj. Agric. Imp. & Power Dist.*, 869 F.2d 503, 504 (9th Cir. 1989); Ariz. Rev. Stat. § 48-2383 (West 2017). For the majority of the seats on SRP's Board (ten seats), landowners' votes are counted proportionate to their landholdings, such that a vote cast by the holder of ten acres counts ten times as much as a vote cast by the holder of one acre. *See* Ariz. Rev. Stat. § 48-2383. About one-third of SRP's electricity customers have no right to vote in SRP elections. Am. Compl. ¶ 32 (ER52).

SRP's retail electric business is unregulated. The business answers only to its own self-interested Board, not a public utility commission or any similar independent body. *Id.* ¶ 42 (ER55). SRP is thus free to serve private, not public interests. As this Court has explained, SRP takes profits from electricity sales and uses them to subsidize irrigation and canal water so that, for example, certain agricultural

interests can farm cheaply by a city in the desert. *See Ball*, 451 U.S. at 365-66.

In short, SRP makes money from electric customers and pays out dividends in the form of irrigating "private lands for personal profit." *Id.* at n.17 (internal quotation marks omitted) (quoting *Local 266*, 78 Ariz. at 44).

III. The Challenged Conduct

In recent years, consumer prices for rooftop solar have dropped and become cost-competitive with SRP's electricity offerings. Am. Compl. ¶¶ 78-86 (ER61-ER62). More consumers than ever substitute purchases from utilities with rooftop solar. *Id.* ¶¶ 50-52 (ER56). As solar generation increased in popularity and efficiency, SRP started to view solar as a long-term competitive threat to its electricity sales and profits. *Id.* ¶ 78 (ER61).

Facing competition for the first time ever, SRP had a choice between competing in the market or using its monopoly power to exclude competition. The antitrust laws require, and our economic system presumes, that firms respond to competition on the merits in ways that benefit consumers, including by reducing prices, increasing efficiency, enhancing customer service, or investing in innovation. *Otter Tail Power Co. v. United States*, 410 U.S. 366, 380 (1973) (addressing electric industry). SRP first attempted to compete on the merits by developing its own solar offerings. Am. Compl. ¶ 79 (ER61). However, consumers continued to prefer SRP's solar competitors. *Id.* ¶¶ 81, 86 (ER62). Then, rather

than offer consumers a better product or value, SRP used its unregulated market power to impose terms that lock customers into remaining what SRP calls "requirements" customers—those who satisfy all their electric needs from, and deal exclusively with, SRP. *Id.* ¶¶ 105-07, 114 (ER65-ER66, ER68). SRP has offered only incoherent and pretextual justifications for this new regime. *Id.* ¶¶ 126-41 (ER73-ER77).

SRP's plan worked. *Id.* ¶ 116. The new requirements it mandated for its customers had a drastic anticompetitive effect. *Id.* ¶¶ 7, 119 (ER48, ER68). New rooftop solar applications—from customers of any firm, not just SolarCity—dropped by about 96 percent. *Id.* ¶¶ 7, 123 (ER48, ER71). SolarCity was forced to stop selling in SRP territory and to relocate employees. *Id.* ¶ 125 (ER72).

IV. District Court Proceedings

SolarCity sued SRP on March 2, 2015, asserting violations of the federal and Arizona antitrust laws, as well as common law torts for intentional interference. Am. Compl. ¶¶ 143-201, 210-217 (ER78-ER84, ER85).

On June 23, 2015, SRP moved to dismiss SolarCity's Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). D. Ariz. ECF No. 53. SRP's motion argued, among other things, that the antitrust state-action doctrine barred SolarCity's antitrust claims. Pet. App. 67a.

On October 27, 2015, the district court granted in part and denied in part SRP's motion. App. 68a-69a. With respect to the state-action doctrine, the order held that SRP failed to show it could invoke the state-action doctrine "at this stage" and that factual questions remained. *Id.* at 67a (internal quotation marks omitted) (quoting *Cost Mgmt. Servs. v. Washington Natural Gas Co.*, 99 F.3d 937, 942-43 (9th Cir. 1996)). When the district court later denied SRP's motion to certify an interlocutory appeal, it reiterated that the motion to dismiss order did not conclusively resolve the state-action question. Pet. App. 33a ("The District is free to raise these immunities at summary judgment").

SRP noticed an interlocutory appeal, arguing that the state-action doctrine and SRP's nominal governmental status provide it an "immunity from suit" comparable to the Eleventh Amendment or qualified immunity. ER42-ER43. SRP simultaneously moved for a stay in the District Court. D. Ariz. ECF No. 83 (ER93). The stay was denied. D. Ariz. ECF No. 102 (ER95). The parties completed fact and expert discovery and filed cross-motions for summary judgment as the appeal was pending. D. Ariz. ECF Nos. 208, 210. At the close of discovery, Petitioner filed a renewed motion to stay pending resolution of the Ninth Circuit appeal. D. Ariz. ECF No. 148. The district court granted Petitioner's motion to stay shortly after the parties filed summary judgment motions. D. Ariz. ECF No. 241.

V. Ninth Circuit Proceedings

The Ninth Circuit dismissed SRP's appeal for lack of jurisdiction, explaining that the state-action immunity doctrine is a "defense to liability and not an immunity from suit" and therefore could not satisfy the "effectively unreviewable" requirement. Pet. App. 11a. The Ninth Circuit rejected SRP's argument that the collateral-order doctrine applies because of the constitutional origins of state-action immunity, noting that an immunity's constitutional origin is not determinative of whether immediate appeal is available. *Id.* The Ninth Circuit also rejected SRP's claim that immediate appeal was necessary to avoid distracting litigation, concluding that "the possibility of mere distraction or inconvenience to [SRP] does not give us jurisdiction here." *Id.* at 13a.

The Ninth Circuit recognized that it was joining the Fourth and Sixth Circuits on one side of a circuit split concerning the availability of collateral-order review of denials of motions to dismiss based on the antitrust state-action doctrine. *Id.* at 14a-15a. However, it also expressly noted that this Court's recent guidance on the narrowness of the collateral-order doctrine has grown stronger since the initial contrary decisions of the Fifth and Eleventh Circuits. *Id.* at 16a-17a.

SRP did not move for *en banc* hearing. Instead, SRP moved to stay issuance of the mandate. Ninth Cir. ECF No. 87. The motion to stay was denied. Ninth Cir. ECF No. 90.

Upon remand, the district court set trial for April 2018. D. Ariz. ECF No. 258.

REASONS TO DENY THE PETITON

I. This Case Does Not Depend On The Split That Petitioner Cites, And In Any Event That Split Is Weak And Self-Correcting

Certiorari should be denied because this case's resolution does not depend on the broader split Petitioner cites. Where, as here, a petitioner is a fundamentally private enterprise, all Circuits to have reached the question have denied interlocutory review. Moreover, the broader split identified by Petitioner is weak and on its way to resolving itself based on this Court's more recent guidance concerning the collateral-order and state-action doctrines. No Circuit has adopted the minority view set forth in decisions by the Fifth and Eleventh Circuits in over two decades—and none is likely to, because that view is inconsistent with recent cases from this Court. On the other hand, one of the two minority Circuits, the Fifth Circuit, has already taken significant steps toward correcting its jurisprudence, and this Court's recent decisions should provide the additional guidance needed for the split to fully self-correct.

A. No Decision in the Past Two Decades Supports SRP's Position

With its decision below, the Ninth Circuit joined the Fourth and Sixth Circuits in the majority view that the denial of state-action protection is not

immediately appealable. In *Huron Valley Hospital, Inc. v. City of Pontiac*, 792 F.2d 563 (6th Cir. 1986), the Sixth Circuit concluded that a denial of state-action immunity did not meet the second and third requirements of the collateral-order test. *Huron Valley* analyzed the limited set of orders that support interlocutory jurisdiction, some of which involve "immunities." *Id.* at 568. *Huron Valley* concluded that, unlike the immunities from suit that justify an interlocutory appeal, the state-action doctrine is "not an 'entitlement' of the same magnitude" as qualified and absolute immunity and that it was "doubtful that the exemption" of state-action immunity "is lost if immediate appeal is denied." *Id.* at 567. Instead, state-action "immunity" is "more akin to a defense of the original claim" and that "[r]eview of the denial on direct appeal after further development of the record certainly affords the necessary protection if the defense is valid." *Id.* The court also concluded that state-action decisions are not completely separate from the merits, observing that the state-action requirements are "intimately intertwined with the ultimate determination that anticompetitive conduct has occurred." *Id.*

The Fourth Circuit agreed with *Huron Valley* in *S.C. State Bd. of Dentistry v. FTC*, 455 F.3d 436 (4th Cir. 2006). The Fourth Circuit analyzed each class of immunities this Court had decided were properly classified as being "effectively unreviewable" after trial. *Id.* at 444. Those immunities are (1) absolute immunity, (2) qualified immunity, (3) Eleventh Amendment sovereign immunity, and (4) the

protections of the Double Jeopardy Clause. *Id.* (citations omitted). In contrast to those immunities from suit, the state-action doctrine "did not arise from any concern about special harms that would result from trial," and "speaks only about the proper interpretation of the Sherman Act"—so the issue was effectively reviewable after trial. *Id.* at 444-445. The Fourth Circuit also concluded that the second and third requirements of the collateral-order doctrine were not satisfied. *Id.* at 441-47.

On the other hand, the Eleventh Circuit in 1986 held state-action denials were immediately appealable. *Commuter Transportation Systems, Inc. v. Hillsborough County Aviation Authority*, 801 F.2d 1286, 1289-90 (11th Cir. 1986). The *Commuter Transportation* case articulates no reasoning except the unexamined observation that "immunity" has been used to describe the antitrust state-action doctrine and, therefore it must be an immunity from suit. *See id.* No court repeated the Eleventh Circuit's error until the Fifth Circuit's *Martin* decision ten years later. *Martin v. Memorial Hosp. at Gulfport*, 86 F.3d 1391 (5th Cir. 1996).

Just three years after *Martin*, however, the Fifth Circuit, *en banc* and speaking unanimously through Judge Higginbotham, undercut *Martin*'s main premise by explaining that it is "inapt" to call the state-action doctrine an "immunity" because it "differs from the qualified and absolute immunities of public officials." *Surgical Care Ctr. of Hammond, L.C. v. Hosp. Serv. Dist. No. 1 of Tangipahoa Par.*,

171 F.3d 231, 234 (5th Cir. 1999) (en banc). The opinion continues,

> While thus a convenient shorthand, "*Parker* immunity" is more accurately a strict standard for locating the reach of the Sherman Act than the judicial creation of a defense to liability for its violation. The price of the shorthand of using similar labels for distinct concepts is the risk of erroneous migrations of principles.

Id. The next year, a Fifth Circuit panel heeded that admonition and narrowed *Martin*, holding that private-entity defendants may not invoke the collateral-order doctrine to appeal an order denying a state-action defense. *Acoustic Systems v. Wenger*, 207 F.3d 287, 293-94 (5th Cir. 2000).

In 2013 the Tenth Circuit declined to hear an interlocutory appeal on the state-action doctrine. *Auraria Student Housing at the Regency, LLC v. Campus Village Apartments, LLC*, 703 F.3d 1147 (10th Cir. 2013). The defendant in *Auraria* was a private entity, and the Tenth Circuit ruled that a private-entity defendant cannot immediately appeal state-action doctrine denials, and refrained from reaching a broader holding at that time. *Id.* at 1151, 1153.

The Ninth Circuit's opinion in this case builds on the Fourth Circuit's reasoning. *First*, the Ninth Circuit noted three "specific incongruities" between state-action immunity and those limited immunities from suit that this Court has identified, concluding that these "discrepancies suggest that state-action

immunity should not be treated the same as absolute, qualified, or Eleventh Amendment immunity."[1] Pet. App. 14a-15a. *Second*, the Ninth Circuit noted that this Court's more recent decisions have placed "emphasis on the narrowness of the collateral-order doctrine." *Id.* at 16a-17a.

B. This Case Does Not Require Resolving A Circuit Split

As discussed above, SRP is "essentially" a "business enterprise[]" that serves private for-profit interests. In light of those circumstances, five Circuits—every one that has analyzed the issue—agree that this appeal would have to be dismissed. *Huron*, 792 F.2d 563 (Sixth Circuit); *S.C. State Bd.*, 455 F.3d 436 (Fourth Circuit); *Auraria Student Housing*, 703 F.3d 1147 (Tenth Circuit); *Acoustic*

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[1] These incongruities are: "First, municipalities may invoke state-action immunity, but they may not rely on qualified or Eleventh Amendment immunity." Pet App. 15a (citations omitted). "Second, the state-action doctrine bars 'all antitrust actions, regardless of the relief sought,' but qualified and sovereign immunities do not prevent suits for certain prospective relief." *Id.* (citations omitted). "[T]hird, an antitrust defendant can invoke state-action immunity even in a lawsuit by the United States," something that, by contrast a state cannot do with the sovereign immunity defense. *Id.* (citations omitted).

Systems, 207 F.3d 287 (Fifth Circuit); Pet. App. 1a-17a (Ninth Circuit).

C. The Broader Circuit Split Identified by Petitioner Is Narrow And Self-Correcting

Even putting aside that no court has applied the collateral-order doctrine to the putative state-action doctrine defense of a defendant such as SRP, this Court's recent decisions will hasten the self-correction of the split that SRP identifies as to true state actors.

Panels from four different Circuits have now addressed interlocutory appeals on the state-action doctrine since this Court's decision in *Will*, and each of those panels has declined jurisdiction. *Auraria*, 703 F.3d at 1151-53 (Tenth Circuit) (no interlocutory appeal for private defendants; avoiding the Circuit split by ruling on that narrow ground); *S.C. State Bd.*, 455 F.3d at 441, 445 (Fourth Circuit) (the state-action doctrine's history and nature demonstrates that it is not an immunity from suit, and state-action decisions cannot satisfy any of the three collateral-order doctrine requirements); *Acoustic Systems*, 207 F.3d at 293-94 (Fifth Circuit) (distinguishing Fifth Circuit's prior panel decision that permitted interlocutory appeals as applying only to government-entity defendants; denying private defendants interlocutory state-action appeals); Pet. App. 1a-17a (Ninth Circuit).

SRP cites the Fifth Circuit's denial of interlocutory review in *Acoustic Systems* for the proposition that the Fifth Circuit still views *Martin*

as controlling. Pet. 16. But *Acoustic Systems'* failure to formally overrule *Martin* does not support Petitioner here. The broader context of *Acoustic Systems* is critical: the Fifth Circuit declined to hear the interlocutory appeal in that case and substantially narrowed *Martin*. Moreover, since *Acoustic Systems*, this Court has issued nearly two full decades of opinions on the state-action and collateral-order doctrines that only deepen the Court's "emphasis on the narrowness of the collateral-order doctrine"—an emphasis that "has grown stronger" over time. Pet. App. 17a (citations omitted).

The state-action doctrine has been similarly reined in. Twice in the past three years this Court has corrected lower court decisions that applied state-action protection too liberally. *Phoebe Putney*, 568 U.S. at 227-28, 236; *N.C. State Bd.*, 135 S. Ct. 1101. Those decisions explain that the state-action doctrine is "narrow" and contrary to "fundamental" national policies, and must not permit entrenched private interests to exclude competition. *Phoebe Putney*, 568 U.S. at 2256-26. These decisions are inconsistent with the view that the state-action doctrine is an immunity from suit on the level of Eleventh Amendment or qualified immunity.

SRP's petition asks this Court to take up the collateral-order and state-action doctrines, without providing the minority Circuits an opportunity to revisit and correct their holdings in light of the consistent authority that undercuts their position. For example, SRP says that the Eleventh Circuit has

"adhered" to its erroneous ruling. Pet. 11-12. However, SRP identifies only a single Eleventh Circuit case within the past 20 years where that Circuit "adhered" to its rule—and that case involved a county in 2010. *Id.* Thus, the Eleventh Circuit has not yet had the chance to correct itself in light of *Phoebe Putney* and *North Carolina State Board* or limit its error to certain types of defendants as the Fifth Circuit did in *Acoustic Systems*. The Eleventh Circuit's cases therefore say nothing about how the Circuit will respond either to this Court's recent precedent or to the Circuits that have consistently held in the past two decades that decisions relating to the state-action doctrine fail to satisfy the stringent standard for collateral-order review.

SRP points to two collateral-order doctrine cases where this Court has found appellate jurisdiction in recent years, suggesting that the Circuits may look to these cases as reasons not to self-correct. Pet. 16-17. But neither of those decisions expands the traditional bounds of the collateral-order doctrine. One case permitted interlocutory appeal of decisions under a federal statute expressly providing absolute immunity to federal employees from common-law tort claims arising out of acts they undertake in the course of their official duties. *Osborn v. Haley*, 549 U.S. 225 (2007). An "absolute immunity" explicitly enacted by Congress is a much smaller step from the absolute immunity claims that traditionally satisfy the collateral-order doctrine. *Will*, 546 U.S. at 349-53. The other case SRP cites permitted immediate appeal by an involuntarily confined patient who

would otherwise have forcibly been medicated. *See Sell v. United States*, 539 U.S. 166 (2003). Similar to Double Jeopardy, *Sell* involved a potential direct violation of a fundamental constitutional right, and an issue that cannot wait for an appeal because a bodily invasion cannot be undone. *Id.* at 176-77.

These distinguishable cases do nothing to undermine the import of this Court's recent decisions in *Mohawk* and *Will*, particularly as applied to orders on the repeatedly-narrowed antitrust state-action doctrine. *Mohawk* and *Will* strongly admonish against extending the collateral-order doctrine and enlarging the number of interlocutory appeals. *Mohawk Indus.*, 558 U.S. at 114 (declining to expand the collateral-order doctrine to privilege-wavier orders); *Will*, 546 U.S. at 353-55 (declining to permit interlocutory appeal of the denial of the imposition of the judgment bar in the Tort Claims Act); *see also Swint*, 514 U.S. 35 (declining to permit interlocutory appeal of a denial of a summary judgment motion of a county commissioner that the defendant asserted was not a policymaker for the purposes of liability under 42 U.S.C. § 1983); *Digital Equip. Corp.*, 511 U.S. at 884 (declining to permit interlocutory appeal of a "refusal to enforce a settlement agreement claimed to shelter a party from suit altogether"); *Cunningham v. Hamilton Cnty.*, 527 U.S. 198, 204 (1999) (declining to permit interlocutory appeal of a Rule 37 sanctions order); *Van Cauwenberghe v. Biard*, 486 U.S. 517 (1988) (declining to expand the collateral-order doctrine to include orders denying motions to dismiss on the

grounds that an extradited person is immune from civil process on *forum non conveniens* grounds).

II. This Case Is Not An Appropriate Vehicle For Review Of The Question Presented

This case is not an appropriate vehicle to resolve the question SRP presents for at least four independent reasons.

First, the district court's order does not satisfy the first collateral-order doctrine requirement—that the decision appealed from conclusively determine the disputed question. Because that essential element is not satisfied, there is no reason to go beyond that issue and reach any purported circuit split. *See, e.g.*, *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 192-93 (1997) (declining to resolve a multivalent circuit split; resting decision on the narrowest possible ground).

The collateral-order doctrine requires the appealed order to "conclusively determine the disputed question" appealed. *Will*, 546 U.S. at 349-50. Determinations are conclusive when "made with the expectation that they will be the final word on the subject addressed." *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 277 (1985) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 12 n.14 (1983)). For example, denials of qualified immunity—which ordinarily unquestionably qualify for immediate appeal—are not appealable when they rest on facts that could permit immunity at a later stage because, in those circumstances, the applicability of qualified

immunity has not been conclusively determined. *Johnson v. Jones*, 515 U.S. 304, 307 (1995); *Ortiz v. Jordan*, 562 U.S. 180, 190-91 (2011).

Here, the district court addressed the state-action doctrine only at the pleading stage and anticipated that the question would be raised again with a developed factual record. Pet. App. 65a-66a, 67a. If that were not plain enough, the Court later invited SRP to "raise these immunities at summary judgment." *Id.*

Second, even if the Court were to conclude that the district court's motion to dismiss decision on the state-action doctrine were a collateral order subject to interlocutory appeal, a decision in SRP's favor would not allow SRP to avoid litigation on the antitrust merits. This is so because SolarCity asserts both federal and state antitrust claims, as well as a state tort claim. No resolution of SRP's state-action defense could immunize against SolarCity's state antitrust claims, and a trial in this case under state antitrust law would look no different than one under the federal antitrust laws.[2]

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[2] There is both federal question and diversity jurisdiction in this case, so the state claims will proceed in the absence of the federal antitrust claims (the only federal claims in this case). *See* ER55 at ¶ 44.

SRP's arguments require characterizing the state-action doctrine as an "immunity from suit" on par with sovereign or qualified immunity because the state-action doctrine reflects *federalism* concerns. *See* Pet. at 1, 3, 25-26. But there can be no federalism issue when a plaintiff asserts *state* law against a purported state entity. An Arizona statute, Section 30-813, resolves any doubt by expressly subjecting SRP to state antitrust law:

> Notwithstanding any other law, the provisions of title 44, chapter 10, article 1 [the Uniform State Antitrust Act as enacted by Arizona], apply to the provisions of competitive electric generation service or other services by public power entities.

Further, because the state-action doctrine is justified by inferring a statutory exception from legislative silence, Section 30-813's clear policy in favor of antitrust enforcement against SRP means there is no basis to apply *Parker*'s inference from legislative silence to Arizona state law. *See Parker*, 317 U.S. at 351. To do so would in fact contravene Arizona's stated intent that SRP should be held accountable to state antitrust law.

SRP's petition anticipates its justiciability problem by discussing a Ninth Circuit opinion that said Arizona would likely apply the state-action doctrine in a different context—where there was no statute such as Section 30-813 that approved antitrust enforcement concerning the market at issue. *Mothershed v. Justices of the Supreme Court*,

410 F.3d 602 (9th Cir. 2005); Pet. at 23-24. But no court below addressed the *Mothershed* issue, Arizona state law is not appropriately before this Court, and *Mothershed* is both indefensible as a matter of logic (it makes no sense to apply a doctrine rooted in federalism concerns to state law claims against an entity like SRP) and outdated because it lacked this Court's guidance in *Phoebe Putney* and *North Carolina State Board*.

Third, SRP itself contends that the state-action doctrine's protection will be "irredeemably lost" as soon as a case proceeds past a motion to dismiss, Pet. at 2-3. Discovery ended in this case and the parties filed motions for summary judgment a year ago. D. Ariz. ECF No. 208, 210. Thus, according to SRP's petition, the burden that makes the state-action doctrine "effectively unreviewable" is not present on the facts of its case.

III. The Decision Below Is Correct

The decision below is fully consistent with this Court's precedents addressing the narrow subset of orders subject to collateral-order review. There is therefore no need for this Court's intervention.

First, the appealed order did not conclusively resolve any state-action doctrine issue. Determinations are conclusive when "made with the expectation that they will be the final word on the subject addressed." *Gulfstream*, 485 U.S. at 277. Here, the district court expressly anticipated that SRP would and could raise the issue again at summary judgment or another merits stage. Pet.

App. 65a-66a, 67a; *see also* Pet. App. 33a n.7 ("The District is free to raise these immunities at summary judgment.").

Second, the state-action doctrine is not completely separate from the merits of the claims at issue—a requirement for collateral-order review. For the state-action doctrine to apply, SRP must first show that the state has "clearly articulated and affirmatively expressed" a policy "to allow the anticompetitive conduct." *N.C. State Bd.*, 135 S. Ct. at 1110, 1112 (internal quotation marks omitted). To satisfy the clear articulation test, "the State must have affirmatively contemplated the displacement of competition such that the challenged anticompetitive effects can be attributed to the 'state itself.'" *Phoebe Putney*, 568 U.S. at 229 (quoting *Parker*, 317 U.S. at 352).[3] Next, because of its structure, SRP is likely to pursue private interests. *Id.* SRP must show that it is "actively supervised" by the state itself. *Id.* at 1110.[4]

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[3] SRP is not sovereign and its actions are not those of "the state itself." Even "state agencies," which have a far stronger claim to sovereignty than SRP, do not meet that standard. *N.C. State Bd.*, 135 S. Ct. at 1111.

[4] SRP focuses on recitals in Arizona's state constitution and statutes, but state-law labels do not control the federal antitrust inquiry, which turns on the state-action doctrine's

"The analysis necessary to determine whether clearly articulated or affirmatively expressed state policy is involved and whether the state actively supervises the anticompetitive conduct" is "intimately intertwined with the ultimate determination that anticompetitive conduct has occurred." *Huron Valley Hosp.*, 792 F.2d at 567; *see also S.C. State Bd.*, 455 F.3d at 442-43 (whether state-action immunity applies is "inherently 'enmeshed' with the underlying cause of action"). For example, whether the conduct was the type the state approved and foresaw may turn on disputed facts about what conduct occurred. Similarly, "clear articulation" may require factual inquiries concerning whether the defendant acted like a "market participant." *A.D. Bedell Wholesale Co., Inc. v. Philip Morris Inc.*, 263 F.3d 239, 265 n.55 (3d Cir. 2001). If the entity's conduct was that of a private economic actor "in a proprietary activity," then it is unlikely the state authorized such conduct to supersede the antitrust laws. *See* Areeda & Hovenkamp, Antitrust Law, ¶ 224e (4th ed. 2014); *see also N.C. State Bd.*, 135 S. Ct. at 1114. Here, the

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substantive test. As this Court put it in *North Carolina State Board*, "the need for supervision turns not on the formal designation given by States to regulators but on the risk that active market participants will pursue private interests in restraining trade." 135 S. Ct. at 1114.

challenged action did not involve an exercise of sovereign power, but was a proprietary activity undertaken for profit. *See Ball*, 451 U.S. at 368; *City of Mesa*, 92 Ariz. at 100. For similar reasons, as explained above, this Court's recent *North Carolina State Board* decision shows that some nominally "state" entities will have to show that they are actively supervised—a necessarily factual showing. 35 S. Ct. at 1111-12.

In addition, a claim of immunity—even a true immunity that protects a party from suit—cannot be conclusively resolved on a motion to dismiss if disputed factual issues remain. *See, e.g.*, *Johnson*, 515 U.S. at 319-20 (holding that the collateral-order doctrine does not permit an immediate appeal of a district court's denial of qualified immunity when the district court concluded there were disputed issues of material fact); *Ortiz*, 562 U.S. at 190-91 (denial of qualified immunity not appealable unless it turns on a "purely legal issue" or "neat abstract issues of law"). Factual issues may remain after initial denials of state-action protection because demonstrating active supervision hinges on a functional analysis of the putative state actor's incentives to serve private—rather than public—interests. *S.C. State Bd.*, 455 F.3d at 441-42. SRP concedes the point, admitting that "where a claim of state-action immunity turns on factual questions, the requisite separateness may not be present." Pet. 34.

Third, SRP cannot show that the state-action doctrine is the kind of right to be exempted from the judicial process that is "effectively unreviewable"

after final judgment. It is not enough for a decision to deny "a claim of right to prevail without trial." *Will*, 546 U.S. at 349-51. Instead, SRP must identify a right not to be tried or subjected to the judicial process at all. *Id.*; *Digital Equip. Corp.*, 511 U.S. at 873 (cautioning against characterizing "every right that could be enforced appropriately by pretrial dismissal" as "conferring a 'right not to stand trial'" and therefore subject to immediate appeal under the collateral-order doctrine). The right's scope, origin, and purpose must be scrutinized; superficial analogies to orders previously held to satisfy the collateral-order doctrine are not enough. *See Will*, 546 U.S. at 350-51 (warning against "the lawyer's temptation to generalize").

The state-action doctrine's provenance shows that it is not an immunity from suit. It is an exception read into a statute that facially applies to all state actors. *See Phoebe Putney*, 568 U.S. at 224-25. Federalism concerns also animate the doctrine, but these are balanced by the competing interests in favor of free and unfettered interstate commerce and against "parochial" favoritism. *N.C. State Bd.*, 135 S. Ct. at 1112-13. SRP says that "officials" will be threatened, but no individual "official" is named and the law already balances concerns about burdening officials with qualified immunity. *E.g.*, Pet. 28. In short, there is no reason that SRP, a business enterprise that exists to benefit certain private landholders for their "personal profit", *Local 266*, 78 Ariz. at 44, cannot withstand the burden and expense of an antitrust trial. Similarly, the

sovereignty and federalism principles that SRP claims are embodied in the Eleventh Amendment, which denies SRP sovereign protection (consistent with this Court's observation that SRP's electricity business is not a traditional incident of state sovereignty, *Ball*, 451 U.S. at 367-68). Thus, SRP argues that the state-action doctrine creates a right the Constitution itself denies SRP. That is a tall order for a "disfavored" and narrow statutory inference.

SRP's view has no principled bounds. Constitutional principles inform many doctrines that are not immunities. For instance, the *Noerr-Pennington* doctrine is a tool of antitrust statutory interpretation, just like the state-action doctrine. Pet App. at 10a (discussing *Nunag-Tanedo v. East Baton Rouge Parish School Bd.*, 711 F.3d 1136, 1140 (9th Cir. 2013)). *Noerr-Pennington* derives from First Amendment concerns, much as federalism informed the state-action doctrine. *Id.* Under SRP's view, the only reason *Noerr-Pennington* "immunity" is not immediately appealable is an assumption that structural principles are inherently worthier than an individual liberty on which our country is founded. Pet. at 28 n.7. Similarly, orders denying Double Jeopardy motions are immediately appealable because that Clause is a right not to be subjected to the peril of a trial, that is, not to be tried at all. *Abney v. United States*, 431 U.S. 651, 660 (1977). By contrast, a denied motion to disqualify counsel may subject a criminal defendant to an unconstitutional trial and keep an innocent incarcerated as the legal

process plays out, but that does not support an immediate appeal. *Flanagan v. United States*, 465 U.S. 259, 266-68 (1984).

IV. A Stay Of This Action For Any Reason Is Unwarranted

SRP's petition also invites the Court to stay the case without its making a motion to stay. A stay is unnecessary and unwarranted for the foregoing reasons. In addition, there is no irreparable harm to SRP. SRP seeks only to avoid the expense and inconvenience of a trial. Even if a decision in this Court could let SRP avoid a full antitrust trial, merely avoiding a trial and sparing inconvenience for its employees cannot justify interfering with the ordinary course of litigation. *Will*, 546 U.S. at 353.

By contrast, antitrust enforcement benefits electric customers and the public interest, and prevents irreparable harm to competition. *See Otter Tail Power Co.*, 410 U.S. at 374; *see also California v. Am. Stores Co.*, 492 U.S. 1301 (O'Connor, Circuit Justice 1989) (granting the State of California's request for a stay of an appellate decision that would dissolve a preliminary injunction enjoining a merger because the risk of anticompetitive effects and reduction of competition that could occur in the absence of an injunction could cause irreparable harm to consumers). This is particularly important here because SRP's conduct has drastically curtailed, if not eliminated altogether, the installation of distributed solar in one of the sunniest markets in the nation. Am. Compl. ¶¶ 7, 123 (ER48, ER71).

CONCLUSION

SRP's petition for a writ of certiorari should be denied.

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